Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

SHIRAZ DHANANI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. WHETHER THE ELEVENTH CIRCUIT IS CORRECTLY APPLYING PLAIN ERROR REVIEW TO SENTENCES PURSUANT TO *UNITED STATES V. BOOKER* WHERE THE ELEVENTH CIRCUIT IS APPLYING PLAIN ERROR REVIEW IN A MANNER WHICH CONFLICTS WITH OTHER CIRCUITS AND WHERE ALL THREE CO-PETITIONERS WERE SENTENCED TO LOWEST END OF GUIDELINE RANGE.

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PETITION FOR A WRIT OF CERTIORARI

The Eleventh Circuit denied relief under *United States v. Booker*, 543 U.S. ___, 160 L. Ed. 2d 621, 125 S. Ct. 738 (2005), in an opinion that incorrectly applies the plain error analysis, conflicts with other circuits, and condemns the petitioner to serve an illegal sentence.

OPINIONS BELOW

The opinions of the Eleventh Circuit are *United States v. Dhanani*, No. 04-11114 (11th Cir. April 12, 2005) and *United States v. Dhanani*, No. 04-11114-II (11th Cir. June 8, 2005) and are attached hereto as Appendices A and B of this Petition.

STATEMENT OF JURISDICTION

Jurisdiction is conferred on this Court by Title 28, United States Code, § 1254. This petition seeks review of a judgment by a panel of the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit Court issued an unpublished opinion affirming the conviction and sentence on April 12, 2005. The petitioner filed a petition for reconsideration and for rehearing *en banc* which was denied on June 8, 2005.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

(i) Course of Proceedings

Petitioner Shiraz Dhanani is a 39 year old naturalized citizen. Petitioner did not have any criminal history.

Petitioner Shiraz Dhanani was arrested, as were numerous co-defendants, on March 14, 2002 on a 138 count indictment, alleging a conspiracy to transport in interstate commerce stolen goods, as well as related substantive counts. The trial commenced on September 8, 2003 and concluded with a conviction on September 17, 2003. He was free on bond until his voluntary surrender to serve the 63 month sentence imposed after conviction at trial. Petitioner Dhanani is presently incarcerated and serving a custodial sentence of 63 months.

(ii) Statement of Facts

Shiraz Dhanani is an immigrant who became a naturalized United States citizen on October 27, 1998. At the time of the events in question, he owned a dry cleaning business and performed odd jobs trucking and transporting

items for other busin[illegible]. In late 2000, Shiraz Dhanani began picking up boxes from cooperating defendant Mohammed Gaffer and transporting the boxes to a trucking company to be shipped to co-petitioner Amzad Lalani. Both Gaffar and Lalani operated legitimate businesses. Gaffar owned the Uzhair Food Mart in Atlanta, and Lalani owned Windy, Inc. in Florida. Shiraz Dhanani, would pick up boxes from Gaffar's house and ship them to Lalani in Florida. He had no role in obtaining the merchandise to be shipped. The majority of boxes retrieved by Mr. Dhanani were already sealed, and therefore, never saw their contents. The few boxes that were not sealed contained various merchandise similar to that sold by both Gaffar and Lalani in their stores. There was nothing about the merchandise that, upon casual observation, would have caused Shiraz Dhanani to suspect that the merchandise was stolen. He stopped retrieving boxes from Mr. Gaffar's house in 2001.

The government alleged that the total value of all the merchandise handled by the conspiracy was over $13 million. At sentencing the court found that the retail value of said merchandise was $9 million. That value drove the sentencing calculation under the then mandatory guideline scheme. In addition to the amount of loss, other guideline sentencing enhancements were applied at sentencing which were found by the judge, not by the jury beyond a reasonable doubt. The trial court sentenced all three of the co-petitioners to the lowest end of the guideline range. Mr. Dhanani's sentencing occurred before this Court's decision in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004).

Shiraz Dhanani appealed his conviction on several grounds, raising numerous trial and sentencing issues,

including *Blakely* and *Booker* issues. After a very protracted oral argument, with intensive discourse on many of the significant issues raised on appeal, the conviction and sentence were affirmed. A petition for rehearing *en banc* followed, which again denied relief based upon *United States v. Rodriguez*, 398 F. 3d 1291 (11th Cir.), *cert. denied*, 162 L. Ed. 2d 866, 125 S. Ct. 2935 (2005).

REASON FOR GRANTING THE WRIT

I. WHETHER THE ELEVENTH CIRCUIT IS CORRECTLY APPLYING PLAIN ERROR REVIEW TO SENTENCES PURSUANT TO *UNITED STATES V. BOOKER* WHERE THE ELEVENTH CIRCUIT IS APPLYING PLAIN ERROR REVIEW IN A MANNER WHICH CONFLICTS WITH OTHER CIRCUITS AND WHERE ALL THREE CO-PETITIONERS WERE SENTENCED TO LOWEST END OF GUIDELINE RANGE AND DISTRICT JUDGE STRUGGLED WITH SUBSTANTIAL MOTION FOR DOWNWARD DEPARTURE.

Judge Posner of the United States Court of Appeals for the Seventh Circuit has said of the Eleventh Circuit's tortured plain error analysis in *Blakely* pipeline cases:

> **[W]e cannot fathom why the Eleventh Circuit wants to condemn some unknown fraction of criminal defendants to serve an illegal sentence.**

See United States v. Paladino, 401 F. 3d 471, 485 (7th Cir. 2005) (emphasis added). Numerous other courts have similarly directly criticized the Eleventh Circuit's interpretation of plain error under *Booker*. *See United States v. Coles*, 403 F. 3d 764 (D.D.C. 2005) (criticizing the Eleventh

Circuit's decision in *Rodriguez*, infra, and following the Seventh Circuit approach to simply ask the district judge whether a different sentence would have been given); *United States v. Hughes*, 401 F. 3d 540 (4th Cir. 2005) (noting that the Eleventh Circuit's language "demonstrates a fundamental misunderstanding of what it means to affect substantial rights"); *United States v. Williams*, 399 F. 3d 450 (2d Cir. 2005) (criticizing Eleventh Circuit approach, noting, "no reason to risk leaving in place a sentence that might be materially lower or higher" than the one that would have been imposed absent the error).

In *United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770 (1993), this Court held that in order to satisfy the plain error test, the defendant must demonstrate (1) error, (2) that it is plain, and (3) that it affects substantial rights. If these three conditions are met, an appellate court may then exercise its discretion to notice the error if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See Johnson v. United States*, 520 U.S. 461, 117 S. Ct. 1544 (1997).

The Eleventh Circuit has held, like the other circuits, that a *Booker* error is an error which is plain. *See United States v. Rodriguez*, 398 F. 3d 1291 (11th Cir. 2005). Where the Eleventh Circuit plain error analysis conflicts with the other circuits is what is the standard for meeting the third prong of the analysis, *i.e.*, what type of record is sufficient to show a reasonable probability of a different result. *See id.*

The Eleventh Circuit has interpreted the third prong of the plain error test as requiring a defendant to show in absolute terms that the result would have been different.

The Eleventh Circuit is looking for an affirmative statement in the record that the District Judge would go lower if only he could. As has been found by so many other courts, the Eleventh Circuit is wrong.

The defendant need only show a reasonable probability that the sentence, imposed by a Judge under an unconstitutional, mandatory, guidelines scheme, would be lower. Said another way, the Eleventh Circuit should be asking the question: is our confidence in the outcome undermined? The Sixth Circuit has found that where the District Judge has sentenced to the low end of the range and expressed sympathy for the defendant, that is sufficient to undermine confidence in the outcome. *See United States v. Hamm*, 400 F. 3d 336 (6th Cir. 2005).

The Eleventh Circuit, the Eighth Circuit and the Fifth Circuit have specifically found that a sentence at the lowest end of the then-mandatory guideline range, without more, is not sufficient to raise a reasonable probability that the court may have imposed a lesser sentence under a non-mandatory guideline scheme. *See United States v. Fields*, 408 F. 3d 1356 (11th Cir. 2005); *United States v. Demarick*, No. 04-15136 (11th Cir. July 12, 2005); *United States v. Leisure*, 412 F. 3d 857 (8th Cir. 2005); *United States v. Ellefson*, No. 04-1293 (8th Cir. August 23, 2005); *United States v. Espinoza-Gamez*, No. 04-50415 (5th Cir. June 3, 2005). Implicitly, the Eleventh Circuit's decision in the instant case of Wendy Lalani, also finds that the sentence at the lowest end of the guideline range, even with the significant evidence presented for a downward departure and expressions of sympathy from the District Judge, were insufficient to meet the third prong of the plain error test in the Eleventh Circuit.

This is directly at odds with other circuits which have expressly found that a sentence at the lowest end of the guideline range available under the then-mandatory scheme was sufficient to meet the third prong of the plain error analysis. *See United States v. Henry*, 408 F. 3d 930 (7th Cir. 2005); *United States v. Hamm*, 400 F. 3d 336 (6th Cir. 2005); *United States v. Rone*, No. 04-5682 (6th Cir. July 27, 2005).

Some of the Circuit Courts have adopted a presumed prejudice standard due to the radical sweeping change in the sentencing regime, noting the difficulty criminal defendants will have demonstrating that their sentence would have been different. *See United States v. Barnett*, 398 F. 3d 516 (6th Cir. 2005). The Second Circuit observed that it is "impossible to tell what considerations counsel for both sides might have brought to the sentencing judge's attention had they known that they could urge the judge to impose a non-Guidelines sentence." *United States v. Crosby*, 397 F. 3d 103 (2d Cir. 2005). The Third Circuit, in *United States v. Davis*, 407 F. 3d 162 (3rd Cir. 2005) ordered the remand of every case pending on direct review with a *Booker* sentencing issue in order to:

> [E]nsure that each defendant to whom *Booker* applies is sentenced accordingly. This approach results in uniform treatment of post-*Booker* defendants on direct appeal, fostering certainty in the administration of justice and efficient use of judicial resources. Moreover as the Court of Appeals for the Second Circuit has noted, "correction of error in the context of sentencing does not precipitate . . . burdensome and often lengthy consequence[s]" on remand. [cite omitted]